

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GARY LEE BANKS,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 1:15-CV-03184-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 14, 20. Attorney D. James Tree represents Gary Lee Banks (Plaintiff); Special Assistant United States Attorney Brett E. Eckelberg represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed an application for Disability Insurance Benefits (DIB) on January 9, 2012, and an application for Supplemental Security Income (SSI) on January 17, 2012. Tr. 64-65, 185-194, 212. In both applications, Plaintiff alleged

1 disability since October 20, 2011, due to cellulitis, bilateral knee pain, missing toes
2 on the left foot, back pain, shoulder pain, and numbness in his hands and toes. Tr.
3 185, 189, 223. The applications were denied initially and upon reconsideration.
4 Tr. 110-117, 119-130. Administrative Law Judge (ALJ) Ilene Sloan held a hearing
5 on February 13, 2014, and heard testimony from Plaintiff and vocational expert
6 Kimberly Mullinax. Tr. 35-63. The ALJ issued an unfavorable decision on
7 February 27, 2014. Tr. 21-30. The Appeals Council denied review on August 20,
8 2015. Tr. 1-7. The ALJ's February 27, 2014, decision became the final decision
9 of the Commissioner, which is appealable to the district court pursuant to 42
10 U.S.C. § 405(g). Plaintiff filed this action for judicial review on October 19, 2015.
11 ECF No. 1, 4.

12 **STATEMENT OF FACTS**

13 The facts of the case are set forth in the administrative hearing transcript, the
14 ALJ's decision, and the briefs of the parties. They are only briefly summarized
15 here.

16 Plaintiff was 56 years old on the alleged onset date. Tr. 185. Plaintiff
17 completed his GED in 2000. Tr. 224. He last worked in October 2011, stating that
18 "[i]n July, 2011 he was put on standby and seven weeks later he was called back in
19 about 9/2011 and then was laid off permanently 10/20/2011 because of his hands."
20 Tr. 224. Plaintiff's work history includes the jobs of drain cleaner and upside lift
21 driver. Tr. 214.

22 **STANDARD OF REVIEW**

23 The ALJ is responsible for determining credibility, resolving conflicts in
24 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
25 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
26 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
27 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
28 not supported by substantial evidence or if it is based on legal error. *Tackett v.*

1 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
 2 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
 3 another way, substantial evidence is such relevant evidence as a reasonable mind
 4 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
 5 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
 6 interpretation, the court may not substitute its judgment for that of the ALJ.
 7 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial
 8 evidence will be set aside if the proper legal standards were not applied in
 9 weighing the evidence and making the decision. *Browner v. Secretary of Health*
 10 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence
 11 supports the administrative findings, or if conflicting evidence supports a finding
 12 of either disability or non-disability, the ALJ's determination is conclusive.
 13 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

14 **SEQUENTIAL EVALUATION PROCESS**

15 The Commissioner has established a five-step sequential evaluation process
 16 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
 17 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
 18 through four, the burden of proof rests upon the claimant to establish a prima facie
 19 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
 20 burden is met once the claimant establishes that physical or mental impairments
 21 prevent him from engaging in his previous occupations. 20 C.F.R. §§
 22 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do his past relevant work,
 23 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show
 24 that (1) the claimant can make an adjustment to other work, and (2) specific jobs
 25 exist in the national economy which the claimant can perform. *Batson v. Comm'r*
 26 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If the claimant cannot
 27 make an adjustment to other work in the national economy, a finding of "disabled"
 28 is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

ADMINISTRATIVE DECISION

On February 27, 2014, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act.

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since October 20, 2011, the alleged date of onset. Tr. 23.

At step two, the ALJ determined Plaintiff had the following medically determinable impairments: eczematous dermatitis of the upper extremities bilaterally, hypertension, hypothyroidism, tendonitis of the left elbow, and status/post left rotator cuff repair. Tr. 23. However, the ALJ found that Plaintiff did not have a severe impairment at step two. *Id.* Therefore, the ALJ did not make a determination for steps three through five and found that Plaintiff had not been under a disability at any time from the alleged onset date, October 20, 2011, through the date of the decision, February 27, 2014. Tr. 30.

ISSUES

The question presented is whether substantial evidence supports the ALJ's decision denying benefits and, if so, whether that decision is based on proper legal standards. Plaintiff contends the ALJ erred by (1) finding Plaintiff had no severe impairments at step two; (2) finding Plaintiff less than fully credible; and (3) failing to give proper weight to medical source opinions.

DISCUSSION

A. Step Two

Plaintiff challenges the ALJ's step two determination in this case.

Step-two of the sequential evaluation process requires the ALJ to determine whether the claimant "has a medically severe impairment or combination of impairments." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citation omitted); 20 C.F.R. § 416.924(c). "An impairment or combination of impairments can be found 'not severe' only if the evidence establishes a slight abnormality that has 'no more than a minimal effect on an individual[']s ability to work.'" *Id.* at

1 1290 (quoting *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (adopting
2 S.S.R. 85-28)). The step-two analysis is “a *de minimis* screening device to dispose
3 of groundless claims.” *Smolen*, 80 F.3d at 1290.

4 The ALJ found Plaintiff did not have a severe impairment. Tr. 23-30. In
5 doing so, she found Plaintiff less than fully credible concerning the intensity,
6 persistence, and limiting effects of his symptoms, Tr. 25, and she weighed the
7 medical source opinions found in the record, Tr. 28-30.

8 **1. Credibility**

9 Plaintiff contests the ALJ’s adverse credibility determination in this case.
10 ECF No. 14 at 14-19.

11 It is generally the province of the ALJ to make credibility determinations,
12 *Andrews*, 53 F.3d at 1039, but the ALJ’s findings must be supported by specific
13 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
14 affirmative evidence of malingering, the ALJ’s reasons for rejecting the claimant’s
15 testimony must be “specific, clear and convincing.” *Smolen*, 80 F.3d at 1281;
16 *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). “General findings are
17 insufficient: rather the ALJ must identify what testimony is not credible and what
18 evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834.

19 The ALJ found Plaintiff less than fully credible concerning the intensity,
20 persistence, and limiting effects of his symptoms. Tr. 25. The ALJ reasoned that
21 Plaintiff was less than fully credible because (1) he received unemployment
22 benefits during the time he alleged to be disabled, and (2) his activities of daily
23 living were inconsistent with the severity of symptoms alleged. Tr. 28.

24 The ALJ’s first reason for rejecting Plaintiff’s credibility, that Plaintiff held
25 himself out as ready, willing, and able to work, by receiving unemployment
26 benefits, is not legally sufficient. The receipt of unemployment benefits can affect
27 a person’s claim for social security benefits, however, there must be evidence to
28 support that the claimant held himself out as ready, willing, and able to work full-

1 time. *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161-1162 (9th Cir.
2 2008); *see also* Wash. Rev. Code § 50.20.119 (setting forth part-time work
3 exception for unemployment benefits). Here, there is no evidence whether
4 Plaintiff held himself out as available for part-time or fulltime work. *See* Tr. 45.
5 Therefore, this reason fails to meet the specific, clear and convincing standard.

6 Furthermore, at the hearing, Plaintiff did not allege that his impairments
7 precluded all work, but that his impairments precluded work above a light
8 exertional level and the grid rules resulted in a finding of disabled. Tr. 40-41. As
9 such, he argued that he would have been willing and able to work at a sedentary or
10 light exertional level. *Id.* Plaintiff’s receipt of unemployment benefits was not
11 contradictory to an application for disability benefits.

12 The ALJ’s second reason for finding Plaintiff less than fully credible, that
13 the alleged severity of the symptoms was inconsistent with his reported activities,
14 is not legally sufficient. A claimant’s daily activities may support an adverse
15 credibility finding if (1) the claimant’s activities contradict his other testimony, or
16 (2) “the claimant is able to spend a substantial part of his day engaged in pursuits
17 involving performance of physical functions that are transferable to a work
18 setting.” *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (citing *Fair v. Bowen*,
19 885 F.2d 597, 603 (9th Cir. 1989)). “The ALJ must make ‘specific findings
20 relating to [the daily] activities’ and their transferability to conclude that a
21 claimant’s daily activities warrant an adverse credibility determination.” *Id.*
22 (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005)). A claimant need
23 not be “utterly incapacitated” to be eligible for benefits. *Fair*, 885 F.2d at 603.

24 Here, the ALJ found that Plaintiff’s activities of meeting his personal care,
25 preparing daily meals, caring for a pet, operating a riding lawn mower, leaving his
26 home, driving a car, going grocery shopping, and doing his own laundry were
27 inconsistent with his reported limitations. Tr. 28. However, for the majority of
28 these activities, it is unclear how these activities were inconsistent with Plaintiff’s

1 reported activities. The ALJ did find that Plaintiff's reports in March of 2012 and
2 April of 2012, that he was performing his own grocery shopping and household
3 chores, were inconsistent with the Plaintiff's hearing testimony that he needed
4 assistance with grocery shopping and household chores due to numbness and pain.
5 Tr. 28. In determining a claimant's credibility, the ALJ may consider ordinary
6 techniques of credibility such as the claimant's inconsistent statements. *Smolen*,
7 80 F.3d at 1284. However, it is unclear if these statements are inconsistent. Since
8 the March of 2012 and April of 2012 reports the ALJ cited, Plaintiff completed
9 Disability Reports in May of 2012 and July of 2012, in which Plaintiff asserted a
10 worsening of symptoms and stated he had difficulty completing household chores.
11 Tr. 256, 261, 263. By the February 13, 2014, hearing, Plaintiff testified a friend
12 helped him complete his grocery shopping and household chores. Tr. 47-48.
13 Therefore, the evidence suggests these statements represent a regression of activity
14 over the course of two years and are not necessary inconsistent. This reason fails
15 to meet the specific, clear and convincing standard.

16 Defendant also argues that the ALJ found Plaintiff less than fully credible
17 because his symptom statements were inconsistent with (1) objective medical
18 evidence and (2) a lack of treatment. ECF No. 20 at 3-8.

19 First, an ALJ may cite inconsistencies between a claimant's testimony and
20 the objective medical evidence in discounting the claimant's testimony, *Bray v.*
21 *Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009), but it cannot
22 serve as the sole ground for rejecting a claimant's credibility, *Rollins v. Massanari*,
23 261 F.3d 853, 857 (9th Cir. 2001). However, in this case the ALJ's citations to the
24 medical record and providers' opinions appears to be more of a discussion of the
25 severity of Plaintiff's medically determinable impairments than a discussion of
26 Plaintiff's credibility. Nowhere in the decision does the ALJ specifically state
27 what testimony was rendered unreliable due to any specific objective evidence or
28 medical opinion. Therefore, this reason also falls short of the specific, clear and

1 convincing standard. *See Lester*, 81 F.3d at 834 (“General findings are
2 insufficient: rather the ALJ must identify what testimony is not credible and what
3 evidence undermines the claimant’s complaints.”).

4 Second, the Ninth Circuit has held that “unexplained, or inadequately
5 explained, failure to seek treatment” may be the basis for an adverse credibility
6 finding unless one of a “number of good reasons for not doing so” applies. *Fair*,
7 885 F.2d at 603. However, benefits cannot be denied because of a claimant’s
8 failure to obtain treatment he cannot afford. *Gamble v. Chater*, 68 F.3d 319, 321
9 (9th Cir. 1995). Nowhere in the decision does the ALJ address Plaintiff’s lack of
10 medical insurance despite a lack of insurance being asserted at the hearing. Tr. 41.

11 In conclusion, the ALJ failed to provide legally sufficient reasons for finding
12 Plaintiff less than fully credible. As such, the case is remanded for the ALJ to
13 make a new determination in accord with S.S.R. 16-3p.

14 **2. Medical Source Opinions**

15 Plaintiff challenges the weight given to the opinions of Nancy Schwarzkopf,
16 ARNP, Bruce Kite, M.D., and Marie Ho, M.D. ECF No. 14 at 19-20.

17 Considering the case is being remanded for the ALJ to properly address
18 Plaintiff’s credibility determination, a reweighing of the medical source opinions
19 will also be necessary on remand.

20 In conclusion, considering the ALJ’s credibility determination was in error,
21 the Court is remanding this case for additional proceedings. On remand, a new
22 step two determination will be necessary. In doing so, the record should be
23 supplemented with any outstanding evidence, including pharmacy records showing
24 the rate of refill of Plaintiff’s eczema medications and testimony from Plaintiff
25 regarding the rate of outbreaks.¹

26
27 ¹The file presents some ambiguity as to the frequency of Plaintiff’s eczema
28 outbreaks and there may be records available to resolve this ambiguity.

REMEDY

The decision whether to remand for further proceedings or reverse and award benefits is within the discretion of the district court. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate where “no useful purpose would be served by further administrative proceedings, or where the record has been thoroughly developed,” *Varney v. Secretary of Health & Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014) (noting that a district court may abuse its discretion not to remand for benefits when all of these conditions are met). This policy is based on the “need to expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find a claimant disabled if all the evidence were properly evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

In this case, it is not clear from the record that the ALJ would be required to find Plaintiff disabled if all the evidence were properly evaluated. Further proceedings are necessary for the ALJ to readdress Plaintiff’s statements regarding his symptoms in accord with S.S.R. 16-3p. Prior to making a new determination, the ALJ will also need to supplement the record, reconsider the medical evidence, and elicit testimony from a medical and a vocational expert.

CONCLUSION

Accordingly, **IT IS ORDERED:**

1. Defendant’s Motion for Summary Judgment, **ECF No. 20**, is **DENIED**.

///

1 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is
2 **GRANTED**, and the matter is **REMANDED** to the Commissioner for additional
3 proceedings consistent with this Order.

4 3. Application for attorney fees may be filed by separate motion.

5 The District Court Executive is directed to file this Order and provide a copy
6 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
7 **and the file shall be CLOSED.**

8 DATED January 19, 2017.

A handwritten signature in black ink, appearing to be "M" or "Rodgers", is written above a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE